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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 35

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

SUPPLEMENTAL MEMORANDUM OF LAW

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SUPPLEMENTAL MEMORANDUM OF LAW

In accordance with instructions given and leave granted by the Court during oral argument of this cause, Petitioners respectfully submit the within Supplemental Memorandum of Law on the question of whether there was available to them an adequate remedy in the Florida courts.

1. Article V of the Florida Constitution, insofar as it is germane to this cause, provides for a judicial hierachy

comprising the Supreme Court of Florida, the District Courts of Appeal, the Circuit Courts and the Municipal Courts. Article V, § 6(3) confers upon the Circuit Courts "final appellate jurisdiction . . . of all cases arising in municipal courts." There is no other provision of Florida law allowing any further appeal from such an appellate judgment of a Circuit Court. The only mode of further review of any such final appellate judgment of a Circuit Court is the limited review under so-called common law certiorari. It is important at the outset, therefore, to distinguish this kind of certiorari jurisdiction from all of the other kinds of certiorari and appellate jurisdiction exercisable within the Florida appellate system.

Article V, § 5(3) establishes the jurisdiction of the District Courts of Appeal. These courts are intermediate appellate courts, vested with general appellate jurisdiction, and were established pursuant to constitutional amendment adopted in 1956. Concurrently therewith, the jurisdiction of the Supreme Court of Florida, as set forth in Article V, § 4(2), was radically limited. Article V, § 5(3), which provides for the general appellate jurisdiction of the District Courts of Appeal, also authorizes such courts to issue writs of certiorari, but does not define the scope of such writs, and this definition must be gleaned from the case law which is discussed at length below.

Article V, § 4(2) vests the Supreme Court with a specially defined certiorari jurisdiction, viz.:

> "The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district

> court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

Obviously, the case at bar is not embraced within any of the foregoing classifications. In addition, § 4(2) vests the Supreme Court with jurisdiction to "review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court." Article V, § 4(2) also vests the Supreme Court with jurisdiction to entertain appeals from District Courts of Appeal in certain limited cricumstances, namely, appeals "from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution." Again, none of the foregoing categories of certiorari or appeal jurisdiction are applicable to the instant case.

Proceedings styled certiorari are also available in Florida under limited circumstances for the purpose of supplementing a deficient record and, in certain extraordinary cases, for reviewing interlocutory orders in actions at law. See *Kilgore* v. *Bird*, 6 So.2d 541 (Fla., 1942).

In addition, Article V, § 6(3) vests the Circuit Courts with certiorari jurisdiction, and this is utilized, for example, in reviewing the orders of administrative agencies. See, for example, Florida Statutes §§ 176.16 and 176.17. Circuit Courts are also empowered to submit certified questions to the District Courts of Appeal under Rule 4.6

of the Florida Appellate Rules (31 Florida Statutes Annotated, Pocket Part, p. 129); however, nothing contained in that Rule, or in its predecessor, Rule 27 of the earlier Florida Supreme Court Rules, (31 Florida Statutes Annotated, p. 511), specifies that such certification is a condition precedent to the finality of a Circuit Court's appellate judgment. "The Rules make it clear that the certification is to be effected by the judge of the Circuit Court — not counsel. It is the judge's prerogative to decide whether he is to (1) rule upon the unique question himself, or (2) certify it." 9 Miami L.Q. 375, 382 (1955).

It is clear, therefore, that the only kind of appellate review that is available in Florida today with respect to a final appellate judgment of a Circuit Court exercising appellate jurisdiction over an inferior court, is so-called common law certiorari, and which, although provided for by the Florida Constitution, is nowhere defined therein. Jurisdiction to exercise this limited form of review over such final appellate judgments of the Circuit Courts is vested by Article V, § 5(3) in the District Courts of Appeal, and this supervisory jurisdiction under the present Florida Constitution is vested solely in the District Courts of Appeal. Thus, in *Robinson* v. *State*, 132 So.2d 3, 5 (Fla., 1961) the Supreme Court of Florida held that:

> " . . . this Court no longer has extensive power to issue so-called 'common law writs of certiorari' to review judgments of lower courts. This power is now vested in District Courts of Appeal and Circuit Courts by Article V, Sections 5 and 6, Florida Constitution. In situations in which review of a judgment or decree of a lower court is not otherwise provided for, the District Courts

> of Appeal are endowed with powers of review limited to a determination of whether the judgment constitutes a deviation from the essential requirements of the law. In a general way, this is the type of so-called common-law certiorari power exercised by this Court prior to the effective date of amended Article V, on July 1, 1957."

Likewise, in *Ramagli Realty Co.* v. *Craver*, 121 So.2d 648, 651 (Fla., 1960) the Florida Supreme Court stated that:

> "Amended Article V of the Constitution limits the power of the Supreme Court to issue writs of certiorari to the district courts in certain matters and to commissions established by law. The Supreme Court no longer possesses the power to issue so called 'common law writs of certiorari.' Such writs may be issued only by the district and circuit courts." (Fn. 9)

2. The writ of common law certiorari in Florida is one "which issues on *discretion* and not as a writ of right." (Emphasis supplied) *Brinson* v. *Tharin*, 127 So. 313, 316 (Fla., 1930). That being so, Petitioners therefore submit that under the rule announced by this Court in *Teamsters Union* v. *Lucas Floor Co.*, 369 U.S. 95; 7 L.Ed.2d 593; 82 S.Ct. 571 (1962), they were not required by 28 U.S.C. § 1257 to seek any further *discretionary* review in the Florida Courts as a predicate for filing their Petition with this Court. Petitioners further point out, however, that not even the limited *discretionary* power of the District Court was exerciseable in the instant case, and for the reasons set forth below.

3. The burden of Petitioners' initial Reply Brief filed in February of 1963 and addressed to the certiorari jurisdiction of this Court, was to show: (1) That common law certiorari in Florida directed to a final judgment of the Circuit Court is a limited mode of appellate review and is limited to a determination of whether the Circuit Court acted without jurisdiction or in violation of the essential requirements of law, and (2) that under the decisions of this Court, the availability of *full and complete* appellate review on all issues by the state tribunal below is the essential requirement in determining whether the state judgment below is final within the meaning of 28 U.S.C. § 1257. Since there is no issue as to the jurisdiction of the Tallahassee Municipal Court or the Circuit Court for Leon County in the premises, the only question remaining for discussion is the meaning of the phrase "the essential requirements of law". Petitioners understand this phrase to refer simply to matters of procedure. The oft-repeated statement in the Florida cases is that this phrase refers to procedural irregularities and does not embrace a further review of the substantive merits of a case. Thus, in *American National Bank of Jacksonville* v. *Marks Lumber & Hardware Co.*, 45 So.2d 336, 337 (Fla., 1950), the Supreme Court of Florida stated:

> "Here no contention is made of a want of jurisdiction in either of the lower courts. Was there an *illegality of procedure?* Bear in mind that to justify the issuance of certiorari the announced rule refers to *illegality of procedure*, not an erroneous proceeding. In determining whether there exists a departure in the essential requirements of law we ascertain whether the court proceeded consistent with the basic principles of

> law relating to the *procedure* to guide to an ultimate determination of the cause.
>
> • • • •
>
> "If peradventure it appears to some that the error was of sufficient magnitude as to cause a miscarriage of justice, it will still not justify the issuance of the writ to have a further review because that would pit the judgment of the Supreme Court against that of the Circuit Court. The Constitution never contemplated or provided for that. In this class of cases we are concerned with the *character* of error instead of its *degree*." (Emphasis supplied)

Likewise, in *Brinson* v. *Tharin*, 127 So. 313, 316 (Fla., 1930), the Florida Supreme Court said that:

> "The writ, confined to its legitimate scope, may issue within the court's discretion at any time to correct the *procedure* of courts wherein they have not observed those requirements of the law which are deemed to be essential to the administration of justice." (Emphasis supplied)

This specific limitation on the writ has been reiterated by at least two of the District Courts of Appeal in cases arising since the aforesaid constitutional amendment namely, *State v. Katz*, 108 So. 2d 60 (Fla. App., 1959) and *State* v. *Smith*, 118 So. 2d 792 (Fla. App., 1960). The reason for the limitation is clear: Article V, § 6(3) specifically states that the Circuit Courts shall have *final* appellate

jurisdiction over cases arising in Muncipal Courts. As the District Court said in *State* v. *Katz, supra,*:

> "Due regard for the plain language of the Constitution prevents this appellate court from entertaining a *second appeal.* The common law Writ of Certiorari was not meant for and may not be diverted to such purpose." 108 So. 2d 60, 61. (Emphasis supplied)

Likewise in *State* v. *Smith, supra,* the District Court stated:

> " . . . certiorari may not be used in this court for the purpose of securing a second appeal, *nor to produce the merits for review on appeal.*" 118 So. 2d 792, 795. (Emphasis supplied)

Petitioners in their Main Brief on the merits urged four points, namely, (1) complete absence of evidence and therefore a denial of due process under the Fourteenth Amendment; (2) violation of the rights of freedom of speech and assembly; (3) interference with interstate commerce; and (4) denial of equal protection of the laws. Petitioners therefore, raised no jurisdictional issues nor are they concerned with the matters of mere procedure. In the circumstances, therefore, Petitioners submit that following the entry of the Circuit Court's order affirming the Muncipal Court judgment, there was no further adequate state remedy available to them for complete vindiction of their Federal Constitutional rights, and for the reasons that:

(1) The so-called common law writ of certiorari is by nature and as defined by the cases a *limited* form of

review, and does not afford the opportunity of full and complete appellate review on all issues, substantive and procedural, which is the *sine qua non* of a final judgment within the meaning of 28 U.S.C. § 1257.

(2) The issues raised by Petitioners in their Assignments of Error and Main Brief before this Court are not matters of jurisdiction or procedure within the scope of the definition of common-law certiorari as set forth in the above-cited Florida cases.

4. Notwithstanding the rule announced in *American National Bank of Jacksonville* v. *Marks Lumber & Hardware Co.*, *Brison* v. *Tharin*, *State* v. *Katz*, and *State* v. *Smith*, *supra*, some of the cases have granted certiorari where there was an "entire absence of essential evidence with resulting material injury." See e. g., *Haile* v. *Bullock*, 91 So. 683 (Fla., 1922), distinguished in *Brinson* v. *Tharin*, *supra*. But even if it be assumed, *arguendo*, that the evidentiary issue raised by Petitioners might have been reviewed by the District Court of Appeal, nevertheless this feature of the case alone would not have formed a predicate for *full* review of all of the substantive issues raised by Petitioners. The logic of this Court's rule requiring an opportunity for full review is clear: if Petitioners were required to petition the District Court of Appeal for certiorari and if the District Court could only have reviewed the evidentiary issue, then Petitioners would have been precluded from raising the remaining, equally vital substantive issues in this Court, unless they were required to file *two* petitions in this Court, namely, one petition directed to the Circuit Court on the issues of freedom of speech and assembly, interstate commerce, and equal protection, and a second, and necessarily later, petition

directed to the District Court on the evidentiary issue. Surely, 28 U.S.C. § 1257 does not contemplate the filing, in a single case, of two petitions in this Court directed to two separate Florida tribunals, each on different levels of the appellate hierachy, and each of which petitions would necessarily reach this Court at widely separated points of time. Surely § 1257 does not require such bizarre appellate procedure, and clearly Petitioners are not required to risk abandonment of three of their four fundamental constitutional defenses merely because of vagaries of Florida appellate procedure. Cf. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; 2 L.Ed 1488; 78 S. Ct. 1163 (1958); *Wright* v. *Georgia*, 373 U.S. 284; 31 Law Week 4487 (1963).

5. Again, and notwithstanding the rule announced in *American National Bank of Jacksonville*, *Brinson* v. *Tharin*, *Katz* and *Smith*, *supra*, some of the Florida cases have added a further variant in the definition of common law certiorari namely, cases where the lower court failed to apply a "correct principle of law" to admitted facts. See, e. g., *Mathews* v. *Metropolitan Life Insurance Company*, 89 So. 2d 641 (Fla., 1956) and *Martin* v. *Powell*, 101 So. 2d 610 (Fla. App., 1958). But even this ostensible expansion of the scope of the writ appears to be simply another way of stating that there must be evidence to support the judgment. Cf. *Richard Store Company* v. *Florida Bridge & Iron, Inc.*, 77 So. 2d, 632 (Fla., 1955). But in any event, any such inconsistencies in the definition or exercise of common law certiorari jurisdiction should not affect this Court's jurisdiction. Petitioners were faced with the clear cut rule announced in *American National Bank of Jacksonville*, *Brinson*, *Katz* and *Smith*, *supra*, on the one hand, and with the murky pronouncements in such cases as *The*

Richard Store Company, ***Martin*** v. ***Powell*** and ***Haile*** v. ***Bullock***, *supra*, on the other. The Florida Constitution speaks of *final* appellate review in the Circuit Court, the cases speak out against *double appeals* and the courts consistently refer to the *limited* scope of common law certiorari jurisdiction. Nowhere have Petitioners found any case in Florida which would in any way support the proposition that full and complete appellate review would have been available in the District Court of Appeal with respect to *all* of the issues raised in their Assignments of Error and Main Brief. For the Respondent City of Tallahassee to contend otherwise would be for them to place Petitioners in precisely the same position as the petitioners in *N.A.A.C.P.* v. *Alabama*, *supra*, where the Court stated that:

> "such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, *because petitioner could not fairly be deemed to have been appraised of its existence*. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." 357 U.S. 449, 457; 2 L.Ed 2d 1488, 1497. (Emphasis supplied)

Clearly, Petitioners efforts here to seek vindication of all of their Federal constitutional rights, in reliance upon the oft-repeated rule that common-law certiorari refers only to procedural matters, should not be thwarted by any vagaries, novelties or inconsistencies of local appellate rules.

As Petitioners pointed out earlier, Respondent in its initial brief in opposition to the petition, contended that Petitioners must first seek relief from the District Court and thereafter from the Supreme Court of Florida before this Court could acquire jurisdiction. However, any such view would thoroughly emasculate the orderly appellate system provided by the Florida Constitution, and would establish the Supreme Court of Florida as the sole "highest court" under 28 U.S.C. § 1257 *in every case*, thereby depriving both the State Constitution and the Federal Statute of their logic and meaning.

CONCLUSION

For the foregoing reasons Petitioners respectfully submit that no further adequate state remedy was available to them within the meaning of 28 U.S.C. § 1257, and that this Court has jurisdiction to entertain these certiorari proceedings.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Memorandum of Law has, pursuant to Rule 33 (1) of the Rules of The Supreme Court of the United States, been served by air mail upon EDWARD J. HILL, Attorney for Respondent, 216 East Jefferson Street, Tallahasse, Florida, this _____ day of October, 1963.

ALFRED I. HOPKINS